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CLERK US DISTRICT COURT DISTRICT OF NEVADA	
By: <u>KEVIN ROHN GILL</u>	DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. 3:17-cv-00159-MMD-CBC

Plaintiff

v.

ROMEO ARANAS, et al.,

Defendants

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. This action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the Court is plaintiff Kevin Rohn Gill's ("Gill") Motion to File Second Amended Complaint ("SAC"). (ECF No. 29.) Defendants responded to the motion requesting that the SAC be screened by the Court (ECF No. 30). The Court now re-screens Gill's SAC pursuant to 28 U.S.C. § 1915A.

I. LEGAL STANDARD

Section 1915 provides, in relevant part, that "the court shall dismiss the case at any time if the court determines that ... the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B)(i)-(iii). Dismissal of a complaint for failure to state a claim upon which relief may be granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard when reviewing the adequacy of a complaint under § 1915. *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012).

1 Under Rule 12(b)(6), the court is to dismiss when the complaint fails to “state a claim
2 for relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).
3 Courts accept as true all well-pled factual allegations, set aside legal conclusions, and
4 verify that the factual allegations state a plausible claim for relief. *Ashcroft v. Iqbal*, 556
5 U.S. 662, 679 (2009). Although the complaint need not contain detailed factual
6 allegations, it must offer more than “a formulaic recitation of the elements of a cause of
7 action” and “raise a right to relief above a speculative level.” *Twombly*, 550 U.S. at 555.

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9 Upon review, the complaint is construed in the light most favorable to the plaintiff.
10 *Chubb Custom Ins. Co. v. Space Systems/Loral Inc.*, 710 F.3d 946, 956 (9th Cir. 2013).
11 The court takes particular care when reviewing the pleadings of a *pro se* plaintiff, as a
12 more forgiving standard applies to litigants not represented by counsel. *Nordstrom v.*
13 *Ryan*, 762 F.3d 903, 908 (9th Cir. 2014). In addition, a *pro se* plaintiff must be given notice
14 of the deficiencies of his or her complaint, and leave to amend, unless the opportunity to
15 amend would be futile. *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995). Despite
16 this leniency, a district court may in its discretion dismiss an *in forma pauperis* complaint
17 if the claim “lacks an arguable basis in either law or fact.” *Id.* This includes claims based
18 on untenable legal conclusions (e.g., claims against defendants who are immune from
19 suit or claims of infringement of a legal interest which clearly does not exist) or fanciful
20 factual allegations (e.g., fantastic or delusional scenarios). *Neitzke v. Williams*, 490 U.S.
21 319, 328, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338 (1989).
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25 II. DISCUSSION

26 A. Plaintiff’s Complaint

27 Gill is a prisoner in the custody of the Nevada Department of Corrections (“NDOC”)
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1 and is currently housed at High Desert State Prison ("HDSP") in Indian springs, Nevada.
 2 (ECF No. 1.) However, the events giving rise to this complaint occurred at Northern
 3 Nevada Correction Center ("NNCC") in Carson City, Nevada. (ECF No. 29, at 6.) Gill has
 4 submitted a civil rights complaint pursuant to 42 U.S.C. § 1983. (ECF No. 1.) On April 2,
 5 2018, the Court screened Gill's First Amended Complaint ("FAC") and determined that
 6 the Eighth Amendment claim for deliberate indifference could proceed against
 7 Defendants Aranas, Brockway, and Perry, but was dismissed without prejudice against
 8 Defendants Mar, Long, Walls, Gedney, Manerlang, and Johns. (ECF No. 5, at 13.) Gill
 9 was granted leave to amend his complaint to cure the deficiencies outlined therein. (*Id.*)
 10 Gill has now submitted a SAC which reiterates the Eighth Amendment claim for deliberate
 11 indifference against Aranas but fails to include Brockway or Perry as Defendants. (ECF
 12 No. 29, at 8.) In addition, the SAC includes Gedney, Mar, Walls, Long, and John Doe's
 13 number one (1) through ten (10)¹ as Defendants; alleges four separate Eighth
 14 Amendment deliberate indifference claims; and, seeks declaratory and monetary relief.
 15 (ECF No. 29.) Based on Gill's claims, the Court construes the SAC as only alleging one
 16 Eighth Amendment deliberate indifference claim against all Defendants.

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 18 The gravamen of Gill's complaint is that he received inadequate medical care while
 19 housed at NNCC. (ECF No. 29, at 6.) Gill claims that he saw various NNCC medical staff
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 24 ¹ Gill's SAC does not properly name John Doe's number one (1) through ten (10) as
 25 Defendants but he discusses them in his "Supporting Facts" section. (*id.*, at 8 – 10.)
 26 Although the use of "Doe" to identify a defendant is not favored, flexibility is allowed in
 27 some cases where the identity of the parties will not be known prior to filing a complaint
 28 but can subsequently be determined through discovery. *Gillespie v. Civiletti*, 629 F.2d
 637, 642 (9th Cir. 1980). If the true identity of any of the Doe defendants comes to light
 during discovery, plaintiff may either move to substitute the true names of Doe defendants
 or move to amend his complaint to assert claims against the Doe defendants at that time.
 Therefore, the Court will treat Gill's SAC as if he had properly named John Doe's number
 one (1) through ten (10) as defendants. *Nordstrom*, 762 F.3d at 908.

1 for his degenerative hip condition, and they were aware of his pain and need for surgery.
2 (*Id.*, at 9–10.) However, NNCC medical staff refused to provide Gill with effective
3 painkillers or to schedule his surgery. (*Id.*) As a result of his four-year delay in receiving
4 treatment for his hip condition, Gill now suffers from a permanent handicap and must
5 endure pain for the rest of his life. (*Id.*, at 9.)
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7 B. ANALYSIS

8 1. Count I – Eighth Amendment Deliberate Indifference

9 Gill alleges an Eighth Amendment claim for deliberate indifference to a serious
10 medical need against each Defendant. (ECF No. 29.) A prison official violates the Eighth
11 Amendment's proscription against cruel and unusual punishment when they act with
12 deliberate indifference to the serious medical needs of a prisoner. *Farmer v. Brennan*,
13 511 U.S. 825, 828 (1994). To establish an Eighth Amendment violation, a plaintiff must
14 satisfy both an objective standard—that the deprivation was serious enough to
15 constitute cruel and unusual punishment—and a subjective standard—deliberate
16 indifference. *Snow v. McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012). To meet the objective
17 standard, the denial of a plaintiff's serious medical need must result in the "unnecessary
18 and wanton infliction of pain." *Id.* (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).
19 Serious medical needs are those "that a reasonable doctor or patient would find
20 important and worthy of comment or treatment; the presence of a medical condition that
21 significantly affects an individual's daily activities' or the existence of chronic and
22 substantial pain." *Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014) (citation and
23 internal punctuation omitted).
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1 To meet the subjective standard of deliberate indifference, a prison official must
2 know that a prisoner faces a substantial risk of serious harm and disregard that risk by
3 failing to take reasonable steps to abate it. *Farmer*, 511 U.S. at 837. Only where a prison
4 "official 'knows of and disregards an excessive risk to inmate health and safety'" is the
5 subjective element of the test satisfied. *Id.* (quoting *Toguchi v. Chung*, 391 F.3d 1051,
6 1057 (9th Cir. 2004)). "Indifference may appear when prison officials deny, delay or
7 intentionally interfere with medical treatment, or it may be shown by the way in which
8 prison physicians provide medical care." *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir.
9 2006). However, a mere delay in medical treatment is not sufficient for a deliberate
10 indifference claim; there must also be harm. *Shapley v. Nev. Bd. of State Prison Comm'rs*,
11 766 F.2d 404, 407 (9th Cir.1985).

14 A disagreement between a plaintiff and defendant physician regarding the course
15 of medical treatment cannot constitute a deliberate indifference claim without establishing
16 that the course of treatment was medically unacceptable and chosen in conscious
17 disregard of an excessive risk to Plaintiff's health. *Jackson v. McIntosh*, 90 F.3d 330, 332
18 (9th Cir.1996). The conduct must consist of "more than ordinary lack of due care." *Farmer*,
19 511 U.S. at 835. Not only must the defendant prison official have actual knowledge from
20 which he or she can infer that a substantial risk of harm exists, but he or she must also
21 draw that inference." *Id.* at 837. The standard lies "somewhere between the poles of
22 negligence at one end and purpose or knowledge at the other[.]" *id.* at 836, and does not
23 include "accidental or unintentional failures to provide adequate medical care . . .," *Estelle*,
24 429 U.S. at 105. Finally, the plaintiff must prove that he was harmed by the indifferent
25 actions, though the harm need not be substantial. *Jett*, 439 F.3d at 1096.

1 For purposes of screening the SAC, Gill satisfies the first prong for a claim of
2 deliberate indifference to a serious medical need. "[T]he existence of chronic and
3 substantial pain indicates that a prisoner's medical needs are serious[.]" *Peralta v. Dillard*,
4 744 F.3d 1076, 1086 (9th Cir. 2014) (internal citation omitted). Gill alleges that he suffers
5 from a degenerative hip condition and chronic back pain. (ECF No. 3, at 8.) He also
6 alleges that his conditions cause "excruciating pain," preventing him from walking without
7 a cane; causing him to lose his breath while walking; and, resulting in pressure in his back
8 and numbness in his right foot, hand, and leg. (*Id.*) Gill therefore alleges a serious medical
9 need by satisfactorily describing his chronic and substantial pain.
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12 However, Gill must also satisfy the deliberate indifference prong to state a
13 colorable Eighth Amendment claim for deliberate indifference. Because Gill sues multiple
14 defendants for varying actions or inactions, the Court will consider the deliberate
15 indifference prong as it relates to each newly named Defendant as outlined below.
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17 a. Defendant Gedney

18 The Court now turns to the allegations against Gedney, which fall into two
19 categories: (1) her opinion that a hip-replacement surgery be delayed for the time being;
20 and (2) her decision regarding what medications to prescribe for Plaintiff's pain. (ECF No.
21 29, at 6 – 10.)
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23 The first category of allegations do not demonstrate deliberate indifference.
24 Gedney informed Gill that he would need hip surgery in the future, but it was not needed
25 at that time. (ECF No. 29, at 7.) Gill's allegations suggest that he disagreed with Gedney's
26 decision as to the surgeries timing. (*Id.*, at 7.) A disagreement between a Plaintiff and
27 Defendant physician regarding the course of medical treatment cannot constitute a
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1 deliberate indifference claim without establishing that the course of treatment was
2 medically unacceptable and chosen in conscious disregard of an excessive risk to
3 Plaintiff's health. *Jackson*, 90 F.3d at 332. Gill fails to meet this standard because his
4 allegations indicate that Gedney did not believe that delaying the surgery would result in
5 a substantial risk of serious harm. (ECF No. 29.) The Court therefore recommends
6 dismissal of Gill's Eighth Amendment claim regarding surgery timing against Gedney.
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8 The second category of allegations also do not demonstrate deliberate
9 indifference. Gedney initially prescribed Gill ibuprofen for his pain, and subsequently
10 prescribed Tegretol - an anti-psychotic medication that is used to treat pain - after he
11 complained that ibuprofen was ineffective. (ECF No. 29, at 7 – 8.) Gill disagreed with
12 Gedney's decision to prescribe both ibuprofen and Tegretol because he requested
13 opiates. (ECF No. 29, at 7.) Gill fails to demonstrate that Gedney's decision to prescribe
14 ibuprofen and Tegretol was "medically unacceptable and chosen in conscious disregard
15 of an excessive risk to [his] health." (ECF No. 29.) The Court therefore dismisses the
16 second category of allegations related to Gill's prescriptions. Accordingly, it is
17 recommended that Gill's Eighth Amendment deliberate indifference claim against Gedney
18 be dismissed.
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21 As discussed in the Court's initial screening order, Gill's allegations could also be
22 construed as alleging a state law negligence claim against Gedney for failing to warn
23 about the side effects of Tegretol. (ECF No. 5, at 9.) The Court instructed Gill that if he
24 wanted to pursue this claim, he should file a state law negligence claim. (*Id.*) Gill, fails to
25 do so. (ECF No. 29.) Therefore, the Court will not address it.
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1 b. Defendant Mar

2 The Court now turns to the allegations against Defendant Mar. (ECF No. 29, at 8.)
3 Based on the allegations, Mar knew: (1) of Gill's pain; (2) that he needed surgery; and,
4 (3) that ibuprofen was ineffective for reducing his pain because of multiple complaints and
5 examinations. (*Id.*) However, Mar refused to prescribe effective painkillers, and
6 responded by stating "there was nothing he could do to help [Gill]." (*Id.*) Gill was
7 dissatisfied with this response because he requested opiates, and he claims that Mar had
8 the "power and authority to prescribe . . . an effective painkiller medication, such as an
9 opiate." (*Id.*) Gill's allegations suggest that he disagreed with Defendant Mar's decision
10 as to what medication should be prescribed. (*Id.*) Gill fails to demonstrate that Mar's
11 refusal to prescribe an opiate was "medically unacceptable and chosen in conscious
12 disregard of an excessive risk to [his] health." (ECF No. 29.) Therefore, it is recommended
13 that Gill's Eighth Amendment deliberate indifference claim against Defendant Mar be
14 dismissed.
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18 c. Defendant Walls

19 The Court now turns to the allegations against Defendant Walls. (ECF No. 29, at
20 7-10.) Based on the allegations, Walls knew of Gill's pain because of multiple complaints
21 and requests for treatment. (*Id.*, at 7.) Further, Walls acknowledged that Gill had a
22 degenerative hip condition but "also stated that [Gill] did not need treatment because his
23 x-ray[s] [weren't] as bad as the x-rays of other prisoners." (*Id.*) Walls' statement
24 demonstrates that Walls knew that Gill faced a substantial risk of serious harm, and his
25 decision to not take any action amounts to disregard. For screening purposes, this is
26 sufficient to state a colorable deliberate indifference claim. Accordingly, Gill's Eighth
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1 Amendment deliberate indifference claim against Walls will be allowed to proceed.

2 d. Defendant Long

3 The Court now turns to the allegations against Defendant Long. (ECF No. 29, at
4 7–10.) Based on the allegations, Gill told Long that ibuprofen was ineffective for dealing
5 with pain, but Long refused to prescribe a stronger painkiller. (*Id.*, at 7.) Gill further alleges
6 that Long “kept himself ignorant of facts that would have given him knowledge of [Gill’s]
7 degenerative hip condition.” (*Id.*) As a result, Long could not have known that Gill faced
8 a substantial risk of serious harm. Gill is unable to meet the subjective prong of the
9 deliberate indifference test because Long didn’t know about a substantial risk of harm to
10 Gill, and therefore, there was nothing for him to disregard. Thus, it is recommended that
11 Gill’s Eighth Amendment deliberate indifference claim against Defendant Long be
12 dismissed.
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15 e. John Does number one (1) through ten (10)

16 The Court now turns to the allegations against John Does number one (1) through
17 ten (10). (*Id.*, at 9–10.) Based on the allegations, Gill was scheduled to be transferred to
18 HDSP for a consultation with an orthopedic surgeon, however, John Does number one
19 (1) through ten (10) did not do so for nearly a year. (*Id.*, at 8–9.) John Does number one
20 (1) through ten (10) were aware of Gill’s hip condition because of his complaints, but still
21 refused to act, resulting in a large delay in treatment. (*Id.*, at 9.) For screening purposes,
22 this is sufficient to state an Eighth Amendment deliberate indifference claim against John
23 Does number one (1) through ten (10). Therefore, Gill’s Eighth Amendment deliberate
24 indifference claim against John Does number one (1) through ten (10) will be allowed to
25 proceed. When discovery begins, Gill will have a chance to learn the identities of John
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1 Does number one (1) through ten (10).

2 **III. CONCLUSION**

3 For the foregoing reasons, the Court, therefore, concludes that Count I will proceed
4 against Aranas, Walls, and John Doe's number one (1) through ten (10).

5 The parties are advised:

6
7 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
8 Practice, the parties may file specific written objections to this Report and
9 Recommendation within fourteen days of receipt. These objections should be entitled
10 "Objections to Magistrate Judge's Report and Recommendation" and should be
11 accompanied by points and authorities for consideration by the District Court.
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13 2. This Report and Recommendation is not an appealable order and any
14 notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of
15 judgment.
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17 **IV. RECOMMENDATION**

18 **IT IS THEREFORE RECOMMENDED** that Gill's Motion to File Second Amended
19 Complaint (ECF No. 29) be **GRANTED** and the Second Amended Complaint be
20 **DETACHED** and **FILED**.

21 **IT IS FURTHER RECOMMENDED** that Count I, alleging deliberate indifference to
22 serious medical need, be allowed to proceed against defendants Aranas, Walls, and John
23 Doe's number one (1) through ten (10).
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25 **IT IS FURTHER RECOMMENDED** that Count I, alleging deliberate indifference to
26 serious medical need be dismissed without prejudice as to defendants Gedney, Mar, and
27 Long.
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DATED THIS 10th day of April 2019.

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